IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-642

JOHN J. DOUGHERTY,

Petitioner,

v.

CHRISTIAN HAALAND,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ABRAHAM E. FREEDMAN,
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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Judgment Order of the Court of Appeals, affirming the judgment of the District Court in this matter, was filed on July 17, 1979. On September 10, 1979, petitioner filed a Motion for enlargement of time to file a Petition for Rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for relief from the final judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. This Motion is reproduced as Appendix A to this Supplement (B1).

Thereafter, on September 11, 1979, the Honorable Arlin M. Adams issued an Order directing the respondent to file an answer to the motion within seven days. Judge Adams' Order is reproduced as Appendix B (B9). On September 17, 1979, respondent filed its answer to the motion. That Answer is reproduced as Appendix C (B11).

Finally, on September 24, 1979, Judge Adams issued an Order denying the motion. That Order is reproduced as Appendix D (B17).

It is submitted that the action of the Court of Appeals in allowing the filing of the aforesaid motion and considering same on its merits resulted in the Judgment of the Court of Appeals not becoming final until the denial of the motion on September 24, 1979. Accordingly, the Petition for Writ of Certiorari filed by petitioner in this matter is timely filed.

In *Bowman v. Loperena*, 311 U. S. 262 (1940), this Court held at page 266 as follows:

> ". . . The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the Court allows the filing and, after considering the merits, denys the petition, the judgment of the Court as originally entered does not become final until such denial, and the time of the appeal runs from the date thereof."

See also Stern and Gressman, *Supreme Court Practice*, 5th Edition, § 6.3, page 399.

Since the Court of Appeals clearly considered the merits of the aforesaid motion, it is respectfully submitted that the finality of the Judgment below was suspended until the Order denying the motion on September 24, 1979.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
STANLEY B. GRUBER,
FREEDMAN AND LORRY,
Attorneys for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 78-2575.

JOHN J. DOUGHERTY,
Appellant,

v.

CHRISTIAN HAALAND,
Appellee.

Motion for Enlargement of Time to File Petition for Rehearing or in the Alternative for Leave to File a Motion in the United States District Court for the Eastern District of Pennsylvania for Relief From the Final Judgment in This Matter Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Appellant, John J. Dougherty, by his attorneys, Messrs. Freedman and Lorry, respectfully moves this Court for enlargement of time to file Petition for Rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for relief from the Final Judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, and states as follows:

1. This action was brought by the appellant-longshoreman against the appellee-shipowner to recover damages for personal injuries sustained while working aboard appellee's vessel. The case was tried before the Honorable Alfred L. Luongo and a jury. At the conclusion of all the evidence, the Court granted the motion of appellee for directed verdict.

2. Thereafter, a timely Appeal was taken to this Court and after the filing of briefs, argument was held on July 13, 1979. On July 17, 1979, this Court (Adams, Rosenn and Higginbotham, Circuit Judges), issued a Judgment Order affirming the judgment of the District Court.

3. Counsel for appellant has now received a copy of this Court's decision in *Griffith v. Wheeling-Pittsburgh Steel Corp.*, (Nos. 78-2159, 78-2160, 78-2161) which was argued on June 7, 1979, more than 1 month prior to the argument in the instant case. The opinion in the *Griffith* case (Gibbons, Weis and Higginbotham, Circuit Judges) was filed by this Court on August 24, 1979, more than 1 month after the entry of the Judgment Order in the case at bar.

4. In *Griffith*, this Court enunciated a standard of care to be applied in cases brought by longshoremen against vessels pursuant to Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b). It is respectfully submitted that application of the standard of care announced in *Griffith* would preclude the issuance of a directed verdict in this case.

5. In view of the fact that the instant Appeal had been decided by way of Judgment Order by an unanimous panel and in view of the fact that counsel for appellant could not have been aware of the forthcoming *Griffith* opinion, counsel determined that a Petition for Rehearing

would be a futile gesture. Accordingly, the 14 day period in which to file a Petition for Rehearing has elapsed.

6. Annexed to this motion is a brief setting forth the manner in which the standard of care relied upon by the District Court in the case at bar has been rejected by this Court in the *Griffith* case. Accordingly, the Judgment Order affirming the judgment below has, in effect, affirmed a judgment based on a standard of care squarely rejected by another panel of this Court. Under the circumstances, it is respectfully submitted that the interests of justice require that appellant be given an opportunity to either file a Petition for Rehearing or file a motion with the District Court for relief from the judgment below under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

FREEDMAN AND LORRY

BY /s/ STANLEY B. GRUBER
Stanely B. Gruber
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2575

JOHN J. DOUGHERTY,

Appellant,

v.

CHRISTIAN HAALAND,

Appellee.

Brief in Support of Motion to Enlarge Time to File Petition for Rehearing or in the Alternative for Leave to File Motion in District Court Pursuant to Rule 60 (b)(6) of the Federal Rules of Civil Procedure.

On July 17, 1979, this Court issued a Judgment Order affirming the judgment of the District Court in this case. The District Court had directed a verdict in favor of the defendant shipowner after the close of all the evidence. Thereafter, the District Court had denied Plaintiff's Motion for a New Trial. The opinion of the District Court is printed at 457 F. Supp. 860.

In formulating a standard of care governing cases brought pursuant to 33 U. S. C. § 905(b), the District Court in this case held:

> ". . . an injured longshoreman seeking to impose liability on a vessel under § 905(b) must show that the vessel was negligent in relying upon the stevedore's expertise and in assuming that the work could be safely done by the stevedore. This in turn requires a showing that (1) the conditions aboard ship created an unreasonable risk of harm, even for a longshoreman working under the guidance of an expert stevedore, and (2) the vessel, although not possessed of the stevedore's expertise, knew or should have known of this unreasonable risk of harm." 457 F. Supp. at page 865.

The standard of care formulated by the District Court in the case at bar does not conform to the standard of care announced by this Court in *Griffith v. Wheeling-Pittsburgh Steel Corp,* — F. 2d —, (Nos. 78-2159, 78-2160, 78-2161). The *Griffith* case was argued on June 7, 1979, more than 1 month before the argument in this case. The opinion in *Griffith* was issued on August 24, 1979, more than 1 month after the issuance of the Judgment Order in the case at bar. In *Griffith,* the vessel argued that it could not be held liable in negligence under § 905(b) "if it has delivered the ship 'in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter' will be able to load or unload the vessel safely by exercising 'ordinary care under the circumstances'." (See pages 11-12 of slip opinion)

In response, this Court held that acceptance of such a standard of care would be at variance with the holding of the Supreme Court in *Edmonds v. Compagnie Generale Transatlantique,* — U. S. —, 47 U. S. L. W. 4868 (June 27, 1979). Thus, Judge Gibbons, speaking for the Court, stated at page 12 of the slip opinion:

> "Under American's first proposed standard of care, the vessel will be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor fails to perform his tasks in an 'expert and experienced' fashion. This

would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the non-negligent longshoreman, the negligence of the stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 amendments in *Edmonds v. Compagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproves a rule that imputes the negligence of a stevedore to the longshoreman *to reduce* his recovery against the negligent shipowner, would approve a rule barring all recovery against the negligent shipowner on the basis of imputed employer negligence." *

The Court went on to reason at page 14 of the slip opinion:

"The sounder approach, we think, is to recognize that § 905(b) imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land-based business. *Accord, Santos v. Scindia Steam Navigation Co. . . . Gallardo v. Westfal-Larsen & Co. A. S. . . .*" **

The Court then formulated the following standard of care at page 14 of the slip opinion:

"At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working aboard ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger."

* A similar argument was made by counsel for appellant at the oral argument of this case held on July 13, 1979.

** The *Gallardo* case was cited favorably on several occasions by the *Griffith* Court. The District Court in the instant case expressly rejected *Gallardo.* 457 F. Supp. at page 864.

Clearly, the District Court did not apply the standard of care expressed by the *Griffith* Court. The *Griffith* case had already been argued when the case at bar was argued on July 13, 1979. The decision in *Griffith* was announced on August 24, 1979, more than 1 month after the Judgment Order issued in this case on July 17, 1979. Accordingly, counsel for appellant was unable to file a petition for rehearing within the required 14 day period based on the *Griffith* decision. There can be no question but that there is a square conflict between the *Griffith* opinion and the opinion of the District Court in this case. Yet, the opinion of the District Court was affirmed by the Judgment Order entered herein. Under the circumstances, there is a significant conflict in the actions taken by the panel of this Court in the *Griffith* case and in the case at bar. Surely, the interests of justice require that appellant be given an opportunity to file a petition for rehearing in view of the decision in the *Griffith* case. In the alternative, leave should be granted to appellant to move the District Court for an Order pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure which permits the District Court to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment."

Conclusion.

For all the foregoing reasons, it is respectfully submitted that the time of appellant in which to file a Petition for Rehearing in this case should be enlarged pursuant to Rule 40 of the Federal Rules of Civil Procedure. In the alternative, an Order should issue granting leave to plaintiff to file a motion with the District Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

FREEDMAN AND LORRY,
By /s/ STANLEY B. GRUBER,
Stanley B. Gruber,
Attorney for Appellant.

Certificate of Service.

This is to certify that a copy of the foregoing Motion for Enlargement of Time to File Petition for Rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for Relief from the Final Judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure has this day been served by hand-delivery to Carl A. Putz, Esquire, Krusen, Evans and Byrne, 500 Public Ledger Building, Philadelphia, Pennsylvania 19106.

/s/ STANLEY B. GRUBER.
Stanley B. Gruber.

Dated: September 10, 1979.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

September 11, 1979

No. 78-2575.

DOUGHERTY, JOHN J.,
Appellant,

v.

HAALAND, CHRISTIAN.
(D. C. Civil No. 76-1703)

Present: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges.

1. Motion by appellant for enlargement of time to file petition for rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for relief from the final judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, *with* Brief in support of motion, in the above-entitled case. The judgment order was filed on July 17, 1979 and the mandate issued on August 8, 1979.

Respectfully,

T. F. QUINN/ags
Clerk.

P.S.—If any answer, due by September 17, 1979, is received it will be forwarded immediately to the panel.

Appellee is directed to file Answer to Appellant's Motion within 7 days from the date of this order.

By THE COURT,

ARLIN M. ADAMS,
Judge.

Dated: September 18, 1979

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 78-2575

JOHN J. DOUGHERTY,
Appellant,

v.

CHRISTIAN HAALAND,
Appellee.

Appellee's Answer to Appellant's Motion for Enlargement of Time to File Petition for Rehearing or in the Alternative for Leave to File a Motion in the United States District Court for the Eastern District of Pennsylvania for Relief From the Final Judgment in This Matter Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Appellee, Christian Haaland, by its attorneys, Messrs. Krusen Evans and Byrne, in answer to the pending Motion of Appellant respectfully avers as follows:

1. Admitted.

2. In addition to the procedural history as recited by Appellant it should be noted further that the case of

Edmonds v. Compagnie Generale Transatlantique—U. S. —, 47 U. S. L. W. 4868 was argued on March 19, 1979 and was decided by the Supreme Court on June 27, 1979. Indeed, *Edmonds, supra,* was referred to by Appellant at time of oral argument in this matter on July 13, 1979.

3. Admitted as stated, however, Appellee denies that the procedural history of *Griffith* provides any support for the granting of Appellant's Motion.

4. It is respectfully submitted that in making the averments in paragraph 4, to the effect that this Court "enunciated a standard of care to be applied in cases brought by longshoremen against vessels", Appellee infers that this Court's decision in *Griffith* brings into effect new principles of law. In fact this Court in *Griffith* clearly reviewed previous decisions including the Supreme Court's decision in *Edmonds, supra,* and the Ninth Circuit Opinion in *Santos v. Scindia Steam Navigation Co.,* 598 F. 2d 480 (9th Cir., 1979) as well as other cases, and applied principles established in those previously decided cases to the facts in *Griffith.*

Moreover, in stating that the application of the standard of care applied in *Griffith* would preclude a directed verdict in this case Appellee attempts to transform this Motion for Enlargement of Time into a Petition for Rehearing on the merits of his position without presenting sound basis for having this Court grant a Motion to Enlarge the Time in which to file such a Petition.

This indirect effort should fail.

5. It is averred that while counsel for Appellant might not have been aware of the pendency of the *Griffith* opinion, he most certainly should have been aware of the cases which form the basis for that opinion including *Edmonds, Santos* and the other cases. Counsel had ample

time within which to review those cases and comply with Rule 40 of the Federal Rules of Appellate procedure.

6. It is respectfully submitted that Appellant's submission of a Brief on the proported merits of his position is improper since the issue, if any, raised by his Motion, is whether there are grounds, upon which he be excused from not having timely filed a Petition for Rehearing.

It is respectfully submitted that, that is the only issue properly before this Court.

KRUSEN EVANS AND BYRNE,
BY /s/ CARL A. PUTZ,
Carl A. Putz, Esquire,
Attorney for Appellee.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2575.

JOHN J. DOUGHERTY,
Appellant,

v.

CHRISTIAN HAALAND,
Appellee.

Brief in Opposition to Appellee's Motion for Enlargement of Time to File Petition for Rehearing or in the Alternative for Leave to File Motion in District Court Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

Appellee's argument, while made in support of his Motion for Enlargement of Time to file a Petition for Rehearing, attempts to raise proported substantive issues in a procedural framework. Appellant's arguments must fail for several reasons.

In arguing that the Court's decision in *Griffith* presents a new standard within which to judge the conduct of a shipowner Appellant fails to consider that *Griffith* is based on the solid corner stone of the *Edmonds* case and the decision in *Santos,* both decisions rendered and reported prior to argument in this matter. The failure of Appellant to file a timely Petition for Rehearing as prescribed by Rule 40 of the Federal Rules of Appellate procedure cannot be excused for a lack of awareness of the outcome of the *Griffith* case when in fact the basis for the Court's decision in *Griffith* was the Supreme Court's opinion in *Edmonds* as well as the Ninth Circuit Opinion in *Santos.*

Further if Appellee's Motion is granted, the time limitation for filing of a Petition for Rehearing under Rule 40 of the Federal Rules of Appellate procedure would be nullified. Judicial economy, served by the Rule, establishing a time limitation and dictating against endless litigation, would be frustrated.

Appellee's position, if adopted, would permit a party to continually comb decisional law to garner language from legal decisions, to support re-argument of a case which had proceeded through pretrial discovery, full exposition of the facts at a jury trial, post-trial motions and the perfection of an Appeal.

In his Motion Appellant attempts to call upon the provisions of Rule 60(b) of the Federal Rules of Civil Procedure. In so doing Appellant has misdirected his reliance on Rule 60(b) F. R. C. P. That rule contemplates action directed to the District Court not the Appeals Court. See *Moore's Federal Practice,* Vol. 7, 1979, 3rd Ed., Sec. 60.28, p. 387. Indeed, in the instant matter following the filing of a certified copy of this Court's Judgment Order the record and exhibits were returned to the Clerk U. S. District Court on August 8, 1979 and this matter no longer resides in this Court.

Rule 60(b) F. R. C. P. can provide no relief to Appellee under the Motion presently before this Court.

Conclusion.

Appellee has not presented any basis to support his Motion under the procedural history as demonstrated by

this record and is not entitled to relief under Rule 40 F. R. A. P. or Rule 60(b) F. R. C. P.

Respectfully submitted,

KRUSEN EVANS AND BYRNE,
BY /s/ CARL A. PUTZ,
Carl A. Putz,
Attorney for Appellee.

Certificate of Service.

This is to certify that a copy of the foregoing Answer to Appellant's Motion for Enlargement of Time to File Petition for Rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for Relief from the Final Judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure has this day been served by hand-delivery to Stanley B. Gruber, Esquire, Freedman and Lorry, 800 Lafayette Building, 5th & Chestnut Streets, Philadelphia, Pennsylvania 19106.

/s/ CARL A. PUTZ
Carl A. Putz

Dated: September 17, 1979

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 11, 1979

No. 78-2575

DOUGHERTY, JOHN J.,
Appellant

v.

HAALAND, CHRISTIAN
(D. C. Civil No. 76-1703)

Present: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

1. Motion by appellant for enlargement of time to file petition for rehearing or in the alternative for leave to file a motion in the United States District Court for the Eastern District of Pennsylvania for relief from the final judgment in this matter pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, *with* Brief in support of motion, in the above-entitled case. The judgment order was filed on July 17, 1979 and the mandate issued on August 8, 1979.

Respectfully,
T. F. QUINN/ags

Clerk

P.S.—If any answer, due by September 17, 1979, is received it will be forwarded immediately to the panel.

The foregoing motion is denied.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

DATED: September 24, 1979